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No. 05-

IN THE
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY;
LORILLARD TOBACCO COMPANY;
R.J. REYNOLDS SMOKE SHOP, INC.,

Petitioners,

v.

SANDRA SHEWRY, DIRECTORY OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DILEEP G. BAL, ACTING CHIEF OF THE TOBACCO CONTROL SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment prohibits government from levying a tax that applies solely to a discrete disfavored group and using the dedicated revenues from the tax to fund government speech attacking the very same group that is subject to the tax.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings in the Ninth Circuit were Petitioners R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, R.J. Reynolds Smoke Shop, Inc., Sandra Shewry, Director of the California Department of Health Services, Dileep G. Bal, Acting Chief of the Tobacco Central Section of the California Department of Health Services and the State of California. Diana M. Bonta appeared as the Director of the California Department of Health Services in the district court. Otherwise, no other party appeared in any proceeding below. Pursuant to Supreme Court Rule 29.6, the following list names all parent companies and subsidiaries (except wholly owned subsidiaries) of each petitioner:

Petitioner R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., formerly known as RJR Nabisco, Inc. On December 11, 2000, R.J. Reynolds Tobacco Holdings, Inc. acquired Nabisco Group Holdings Corp, now a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., renamed RJR Acquisition Corp. Since June 15, 1999, R.J. Reynolds Tobacco Holdings, Inc. has been a publicly owned corporation. Before then, RJR Nabisco, Inc. was a wholly owned subsidiary of RJR Nabisco Holdings Corp., a publicly owned corporation. RJR Nabisco Holdings Corp. is now Nabisco Group Holdings Corp., and since June 14, 1999, has not held a direct or indirect ownership interest in R.J. Reynolds Tobacco Holdings, Inc. or R.J. Reynolds Tobacco Company. R.J. Reynolds Tobacco Holdings, Inc. is now a wholly-owned subsidiary of Reynolds American Inc. Brown & Williamson Holdings, Inc. owns approximately 42% of Reynolds American Inc. and is an indirect wholly-owned subsidiary of British American Tobacco, p.l.c.

Petitioner R.J. Reynolds Smoke Shop Inc. is a wholly owned subsidiary of Petitioner R.J. Reynolds Tobacco Company.

Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. There is no other publicly held corporation that owns 10% or more of this Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit. The panel majority held that a state may tax an unpopular business and use the dedicated proceeds of that tax in a public campaign designed to destroy that business. Certiorari should be granted to resolve an important First Amendment question as to whether the use of a targeted tax to fund government speech against the taxpayer is an unconstitutional form of compelled speech.

OPINIONS BELOW

The amended opinion of the court of appeals, App., *infra*, 1a-47a, is reported at 423 F.3d 906. The original opinion of the court of appeals, App., *infra*, 48a, is reported at 384 F.3d 1126. The order of the district court, App., *infra*, 49a-99a, is reported at 272 F. Supp. 3d 1089.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2004. Rehearing en banc was denied, and the panel's opinion amended, on September 9, 2005. App., *infra*, 1a. On November 28, 2005, Justice O'Connor granted an application for an extension of time to file a petition for certiorari to and including Jan. 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The relevant provisions of the California Tobacco Tax and Health Promotion Act of 1988, Cal. Rev. & Tax.

Code §§ 30121-30130 are reproduced in the Appendix, App., *infra*, 100a-103a.

STATEMENT OF THE CASE

This case presents an important question at the intersection of the First Amendment doctrines of "government speech" and "compelled speech": May the government, consistent with the First Amendment, tax an unpopular business and use the dedicated proceeds of the tax to fund a public campaign vilifying that business, partly through associating it with unwanted messages?

Pursuant to California's "Proposition 99," Petitioners pay a tax to the State of 25 cents per pack of cigarettes they distribute to consumers in California. The proceeds of the tax are used, in part, to fund an anti-smoking media campaign. The campaign includes some conventional advertisements focused on the health risks of smoking, but spends nearly twice as much on advertisements that demonize the tobacco industry and tobacco company executives. California has described these ads as "anti-industry" and "propaganda," and its Attorney General candidly "agreed that the ad campaign aimed to put [Petitioners] out of business." App. *infra*, 32a. Petitioners challenged the State's imposition of a targeted tax to fund ads attacking the taxpayers.

The Ninth Circuit held that California's "tax-and-smear" campaign could not violate the First Amendment because it constituted "government speech." The Ninth Circuit's holding did not allow for any First Amendment limits on "government speech," contrary to this Court's decision in *Johanns* v. *Livestock Marketing Association*, 125 S. Ct. 2055 (2005), and decisions of other courts.

1. California's "Proposition 99." By ballot initiative, California's voters approved the "Tobacco Tax and Health Promotion Act of 1988," also known as "Proposition 99." App., *infra*, 50a-51a; Cal. Rev. & Tax. Code §§ 30121-30130. The Act imposes a 25-cent per pack

"surtax" on cigarette sales by distributors of tobacco products in California. Cal. Rev. & Tax. Code § 30123. Petitioners are manufacturers rather than distributors, but they are required to pay the surtax because they also provide cigarettes directly to consumers. *See* App., *infra*, 6a.

The proceeds of the surtax are deposited in the "Cigarette and Tobacco Products Surtax Fund." *Id.*, § 30122(a). Tax revenues deposited in the Fund may be used for four purposes, the first of which is "tobacco-related school and community health education programs."[1] *Id.* Twenty percent of the taxes collected are allocated to the "Health Education Account," which may be used only "for programs for the prevention and reduction of tobacco use, primarily among children, through school and community health education programs." *Id.* §§ 30122(b)(1), 30124(b). An additional twenty-five percent of the tax proceeds are placed in an "Unallocated Account," which may be used for tobacco-related programs or any of the other purposes for which tax revenues deposited in the Surtax Fund may be used.[2] *Id.* §§ 30122(b), 30124(b).

To implement Proposition 99, the California legislature in 1989 directed the California Department of Health Services to establish "a program on tobacco use and health to reduce tobacco use in California by conducting health education interventions and behavior

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[1] The other purposes are tobacco-related disease research, medical care for uninsured patients who cannot afford to pay, and programs for fire prevention, environmental conservation, and wildlife habitats. Cal. Rev. & Tax. Code § 30122(a).

[2] The remainder of the surtax fund is apportioned among the Hospital Services Account (35%), the Physician Services Account (10%), the Research Account (5%), and the Public Resources Account (5%). Cal. Rev. & Tax. Code § 30124(b).

change programs at the state level, in the community, and other nonschool settings." Cal. Health & Safety Code § 104375(a). Under the program, known as the Tobacco Control Program, the Department is required to "develop a media campaign directed to raising public awareness of the deleterious effects of smoking and to effect a reduction in tobacco use." App., *infra*, 53a. The Tobacco Control Program is funded entirely from the Health Education Account, which in turn is funded exclusively from the proceeds of the surtax. *Id.* at 3a. Approximately two-thirds of the surtax proceeds allocated to the Health Education Account are used by California's Department of Health Services for its tobacco control activities. App., *infra*, 53a.

2. The Department of Health Services' Anti-Industry Advertisements. Soon after initiating the Tobacco Control Program in 1989, the Department of Health Services determined that a media campaign focused solely on education about the health risks of smoking would have only limited success in reducing smoking. App., *infra*, 3a. The Department decided that it would adopt a different approach, which was "to portray the tobacco industry itself as deceptive and as an enemy of the public health." *Id.* at 4a. To implement this approach, the Department launched a series of television commercials.

The district court described some of the Department's anti-industry advertisements:

> A recent round of television commercials features an actor playing a public relations executive for the fictional cigarette brand "Hampton," detailing for viewers his unseemly methods for getting people to start smoking. The ads end with the tagline, "Do You Smell Smoke?," implicitly referencing both cigarette smoke and a smoke-and-mirrors marketing strategy.